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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JOSE CARLOS MONTANO et al., Defendants and Appellants.	A139919 (Contra Costa County Super. Ct. No. 51015015)

Jose Carlos Montano (defendant Montano) and Marcelles James Peter (defendant Peter; together, defendants) appeal from judgments entered after their juries found them guilty of forcible rape in concert (Pen. Code, § 264.1; count 1),[1] rape by a foreign object in concert (§§ 289, 264.1; count 2), and forcible oral copulation in concert (former § 288a, subd. (d); count 4),[2] and found true a great bodily injury allegation as to count 4 (§ 667.61, subds. (d), (e)).[3] The trial court sentenced defendant Montano to 33 years to life and defendant Peter to 29 years to life in prison.

Defendants contend the trial court made multiple instructional errors. Defendant

[1] All further statutory references are to the Penal Code unless otherwise stated.

[2] The Legislature amended and renumbered former section 288a as section 287 effective January 1, 2019. (Stats. 2018, ch. 423, § 49, No. 4 Deering's Adv. Legis. Service, pp. 284–286.)

[3] For the trial, the court renumbered the counts charged in the information "to eliminate counts in which other individuals are charged." Thus, counts 1, 3, and 4 became counts 1, 2, and 3. We follow the counts as reflected in the abstracts of judgment, which follow the counts as charged in the information.

Montano contends the court also erred in denying his motion to release confidential juror information. Defendant Peter contends the court also erred in admitting evidence of his confession to police, and that his trial counsel rendered constitutionally ineffective assistance by failing to redact the parts of an interview during which he declined to take a polygraph test. We reject all of the contentions and affirm the judgments.

FACTUAL AND PROCEDURAL BACKGROUND

On July 30, 2012, a second amended information was filed charging defendants with forcible rape in concert (§ 264.1; count 1), rape by a foreign object in concert (§§ 289, 264.1; count 3), and forcible oral copulation in concert (former § 288a, subd. (d); count 4). The information alleged as to each count that defendants committed great bodily injury (§ 667.61, subds. (b), (d), (e)). The trial court granted the prosecutor's motion to try the case before two juries.

The victim, referred to as Jane Doe (Jane), was a 16-year-old sophomore at Richmond High School. On October 24, 2009, Jane attended her school's homecoming dance, which took place in the school gymnasium. Jane's father (Mr. Doe) dropped Jane off at the dance at about 6:00 p.m. and told her he would pick her up when the dance ended at 11:00 p.m., or that she could call him if she wished to be picked up earlier.

About two hours into the dance, Jane decided to leave because the strobe lights and loud music were giving her a headache. A school resource officer who saw Jane leave about halfway through the dance said Jane showed no signs of alcohol intoxication.

Jane walked outside and was about to call her father to pick her up when C.S.—a fellow Richmond High School student she had known since middle school—invited her to join him and his friends at a picnic table on school grounds. There were three Hispanic males there, including two she met that night—defendant Montano and S.R. Everyone was polite, and S.R. put his jacket down on the bench for her to sit on.

Jane had never had any alcohol before that night. She told police that she drank some brandy that night because she was upset to have just learned her parents were getting divorced. After some time, she told the group she needed to leave because her head hurt and she had church the next morning. C.S. said, "Okay, well, I'll see you

Monday." Jane tried to stand up to leave but fell. The next thing she remembered was waking up in the hospital.

When Jane woke up, she felt "excruciating pain" "from head to toe." Her face was "distorted" and swollen, and her jaw felt out of place. She felt a stabbing, throbbing pain in her vaginal area that lasted three weeks. At the time of trial, she still suffered from migraines and learning and memory issues.

Mr. Doe did not receive a call from Jane asking to be picked up early, so he headed to the school at about 10:45 p.m. As he drove, he received a call from Jane's cell phone. Thinking it was Jane calling, he answered with "kind of a fun hello," but a male voice said something like, "You know, sir, there are five of us who think your daughter is a wonderful fuck and she gives great blowjobs."

Mr. Doe was shocked, and after the caller hung up, he repeatedly tried to reach Jane's cell phone, with no response. Hoping it was a bad "high school prank," Mr. Doe continued to drive, arriving at the school a few minutes later. As he waited for Jane, a janitor came out and told him there was no one left inside.

Mr. Doe then saw a police car drive by slowly with its spotlight on and speed up around the corner.[4] Mr. Doe followed and saw other officers and a crowd of onlookers. He told an officer that his daughter was missing. A few minutes later, another officer told him that Jane had been raped and was being taken to a hospital. Mr. Doe became distraught, and he cursed as he shook the fence of a nearby house.

The next time Mr. Doe saw Jane was in the hospital's intensive care unit. She was unresponsive and looked like she was near death. Jane stayed in the hospital for four to six days.

Jane's medical records showed she weighed 93 pounds and had a .355 blood alcohol level when she was admitted to the hospital. She was unresponsive to voice or

[4] Someone called 911 after hearing two Hispanic males and one Black male near the school yelling, "There's a drunk girl behind Richmond High. If you guys want to fuck, go ahead."

touch, and "her upper brain powers were not sending signals down to the rest of her body." Her diagnoses included concussion with coma, respiratory failure, cerebral edema, sexual abuse, heart irregularities, and bruises and contusions. A sexual assault examination showed abrasions and lacerations on her torso, buttocks, and legs and outside the vaginal area and anus. Her head trauma was significant and likely the result of repeated blows to the head. She was in critical condition, in need of full intensive care, and "not many alcohol points away from death."

Richmond Police Officers Gunnar Googins and Todd Kaiser heard a dispatch call about a naked female in the high school courtyard and arrived at the scene within a few minutes. There, they saw a group of five to seven "Hispanic male . . . and possibly some black male" adults or youths between the ages of 15 and 20 look at the officers and run.

As the officers drove around the corner, Googins saw a Hispanic male running away. Googins and Kaiser then spotted the "limp body" of a young teenage female under a picnic table, unconscious, unresponsive, and slumped over a support bar. She was exposed from the waist down and her vaginal area was red. Googins stayed with Jane while Kaiser told other officers which way the males had fled.

Meanwhile, one of the officers caught up with Manuel Ortega (Ortega), the Hispanic male Googins had seen running from the courtyard. Ortega was drunk and combative. He called Jane a "bitch" and said, "She wanted me." "I didn't rape her. She's a grown-ass woman." He also said "she was so drunk; she didn't even know what was going on." "I wasn't the only one. There was hella people. She wanted it. [She] wanted it. [She] wanted the dick. She wanted all of us."

Several individuals, including Ortega and Ari Morales (Morales), entered guilty pleas before the case went to trial. Ortega was serving a 32-year sentence and Morales was serving a 27-year sentence for crimes related to this case. Both of them testified at defendants' trial.

Ortega testified that "[e]verybody" began pulling Jane's clothes off and slapping her after she drank some brandy and "fell." Ortega tried to get Jane to orally copulate him and hit her in the face because her teeth were clenched. At one point, defendant

Montano "raped" the girl by going up and down on her for two to five seconds; he then got up and left.

Morales testified he was friends with defendants Montano and Peter. That night, Morales went to the back of the school after someone said there was " '[a] drunk white girl back there.' " There, he saw about 20 people standing around an unconscious girl. Ortega "torture[d] this girl" by punching her in the head with his fist more than 10 times after he could not get her to orally copulate him. Ortega told Morales, "Back off, Cuz. I'm trying to get my dick sucked."

As Ortega was trying to be orally copulated, defendant Montano took a condom out of his pocket, put it on, "and [a] couple seconds later was on the floor having sex or intercourse" with the girl. Defendant Montano's body made "an inward/outward motion" "[p]robably more than six, seven" times while the crowd looked on. Defendant Montano got up, threw the condom toward some bushes, then went back to look for it.

Morales admitted he inserted the antenna of a walkie-talkie into the girl's vagina. He also stole the girl's ring and urinated on her. He denied that he was with defendant Peter that night, but in a recording of a police interview that was played at trial, he told police that he and defendant Peter were together. During the interview, Morales told police that he said to defendant Peter, "Hey, they're raping a little girl over there." Defendant Peter responded, "For real?" and the two went to see what was going on.

Many others testified about what they witnessed that night. E.R., who was friends with defendant Montano, testified that Ortega slapped the girl "super hard" after saying something like "Let's pull a train on her," and "got on top of her face" to "get his dick sucked." "[A]fter that, . . . I don't know exactly how the condom situation happened, but I just remember Montano, he just got on top of her. It looked like he was . . . going to do it. That's what he said." Then, "[i]t looked like he just like snapped out of it and kind of got back up," saying he was " 'just playing.' " When defendant Montano got on top of the girl, the girl was on the ground with her legs open, and there was nothing covering her vagina. When questioned by police, E.R. said defendant Montano was on top of the girl for "like 15 seconds or so," "looked like he was going to do it," and "got back up."

R.B. testified that he saw people "just torturing" the girl by "doing stuff you wouldn't really do to a human being" such as "dragging her" around and trying to "stick" or "shov[e]" a skateboard "in her vagina area" with "some force" as she was slouched down on the ground. He heard someone say, "I got condoms," and someone say, "Run a train." Ortega and defendant Montano were dragging the girl, and defendant Montano was "slapping [the girl's] ass" as others joined in. The crowd was "all chanting and laughing." R.B.'s friend M.V. told police that he saw people touching the girl's vagina.

S.R., who was at the scene when Jane first arrived, saw everyone circle around her after she drank some alcohol and fell. A "whole bunch of people" arrived. Ortega announced, "I'm next," and ripped Jane's pantyhose off and hit her at least twice. Someone poured brandy on her vagina, and others hit her. Defendant Peter and a heavy Mexican man took pictures or videos of Jane with their cell phones. Jane's clothes were torn and she was unconscious on the ground. S.R. tried to get people to stop but no one listened. He left the scene after telling R.B., "I ain't trying to be part of this shit." Several days later, S.R. called police to tell them what he knew about the incident.

Richmond High School student J.B. testified regarding admissions he heard defendants Montano and Peter make. He testified he did not go to the dance but saw Morales and defendants Montano and Peter when he went to a friend's house to make music the next day. J.B. knew defendant Peter through his cousin and felt close to him. He also knew defendant Montano but was not close to him.

At some point, defendants Peter and Montano and Morales began talking about what had happened the night of the dance. Defendant Montano said he "fucked" her, defendant Peter said he "finger-banged her," and Morales said he "pissed on her." They did not get into details but "just said they did it" and were laughing about it. A few days later, J.B. was interviewed by police and told them about the statements.

J.S. testified that Morales and defendants Montano and Peter would sometimes come to his house to mix and record music. J.B. would also come. J.S. felt closer to defendant Peter than he did to the others and considered him a friend. He was older than everyone else and sometimes gave them advice, including telling them he would never

have sex with a woman who had been drinking.

At about 11:30 p.m. on the night of the dance, Morales and defendant Montano went to J.S.'s house. S.O., a music artist, was also there. At some point, J.S. heard S.O. say, "You guys didn't rape that girl?" or "Did you say you guys just raped her?" Defendant Montano said, "Shh," and attempted to "shush [Morales] up." Morales said something like, "All I did was pee on her."

The next morning, Morales and defendant Peter went to J.S.'s house. Defendant Peter was with someone, who "I guess was [J.B.]," but J.S. did not recall with certainty that it was J.B. When J.S. asked defendant Peter, "You weren't there, were you?" defendant Peter said he was at the school "for like 20 minutes" and "didn't touch [the girl], but he videotaped her on a cell phone . . . ." J.S. told him "it would probably be smart for him to erase the videotape . . . ." J.S. did not remember J.B. coming over that day, "but from what I've heard I guess he was there . . . he wasn't there that night, so he had to be there that morning."

A few days after the school dance, Richmond Police Robbery/Homicide Unit Detective Stina Johanson (Johanson) and another officer interviewed defendant Peter at the police station for about two and a half hours. Five days later, she and a different officer interviewed defendant Peter again, at juvenile hall. Recordings of portions of the interviews were played for the jury. During the first interview, defendant Peter admitted he "fondled" Jane.

A Richmond Police Department crime scene investigator gathered evidence at the scene, including empty aluminum cans, two open condom wrappers, two packages of unused condoms, a used condom, Jane's student identification card, a flashlight, a walkie-talkie, women's shoes and underwear, ripped stockings, a necklace, earrings, an empty purse, a hairbrush, and makeup. A criminalist swabbed the items for DNA analysis and found sperm cells, blood stains, and epithelial cells on some of the items.

A forensic supervisor identified multiple DNA profiles on the items, including the profiles of Ortega, defendant Montano, defendant Peter, and J.C. (who, along with several others, had been named as a defendant in the original information). There were

other profiles that were not matched with any identified individual.

Sperm from Ortega and J.C. were found on Jane's mouth and neck. On the exterior of a used, broken condom was a non-sperm fraction[5] that matched Jane and defendant Peter. On the interior of the same condom was a sperm fraction that matched J.C. as a major profile and defendant Peter as a "very restricted" profile. The forensic supervisor could not say for sure whether defendant Peter's DNA that was found in the sperm fraction was his sperm, as opposed to other types of DNA. This is because there can sometimes be "carryover," whereby DNA from a non-sperm fraction is carried over into a sperm fraction.

The forensic supervisor stated it was "extremely unlikely" that defendant Peter's DNA would be found on the condom simply because he touched it, because "a touch source" is not likely to be detected among "other rich sources of nucleated cellular material" such as epithelial cells or sperm. If, however, defendant Peter had saliva or semen on his hand when he came into contact with the condom, his DNA could be detected even among other, rich DNA sources such as sperm. The DNA found on the condom matched defendant Peter's profile with a chance that only one in 24 sextillion African-Americans, one in 1.2 sextillion Caucasians, or one in 83 sextillion Hispanics would have the same profile.

One aluminum can produced DNA profiles of defendants Montano and Peter. Another can produced DNA profiles of E.R., defendant Montano, and possibly Ortega. One open condom wrapper had defendant Montano's DNA as the primary association, with a chance that one in 1.8 million African-Americans, one in 16 million Caucasians, or one in 140,000 Hispanics would have the same profile. A second open condom wrapper had Jane as the primary association and partial results consistent with defendant

[5] A laboratory process was used to separate sperm cells from all other, "non-sperm" cells.

Montano at a "stochastic"[6] level.

Defendant Peter's jury found him guilty on all three counts and found the great bodily injury allegation true as to count 3 (count 4 of the information). The next day, defendant Montano's jury found him guilty on all three counts and found the great bodily injury allegation true as to count 3 (count 4 of the information). The trial court sentenced defendant Montano to 33 years to life and defendant Peter to 29 years to life in prison.

DISCUSSION

A. Jury Instructions

1. CALJIC No. 3.01

The trial court instructed the juries with CALJIC No. 3.01, as follows: "A person aids and abets the commission or attempted commission of a crime when he: [¶] (1) With knowledge of the unlawful purpose of the perpetrator, and [¶] (2) With the intent or purpose of committing or encouraging or facilitating the commission of the crime, and [¶] (3) By act or advice, aids, promotes, encourages or instigates the commission of the crime. [¶] A person who aids and abets the commission or attempted commission of a crime need not be present at the scene of the crime. [¶] Mere presence at the scene of a crime which does not itself assist the commission of the crime does not amount to aiding and abetting. [¶] Mere knowledge that a crime is being committed and the failure to prevent it does not amount to aiding and abetting."

Defendant Montano contends—and defendant Peter joins in the contention—that the instruction was deficient because it did not inform the jury that the offense of aiding and abetting requires proof of "specific intent" to commit the crime in question.

Generally, " '[a] party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language.' " (*People v. Hart* (1999)

[6] "Stochastic" describes circumstances in which the results may not replicate "from one analysis to the next," which renders it "very difficult . . . to arrive at a profile without taking educated guesses . . . ."

20 Cal.4th 546, 622.) The failure to object to an instruction on a specific ground argued on appeal forfeits the argument. (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1320.) Defendants did not object to or request modification of this instruction, and therefore forfeited this claim. (*People v. Hart*, *supra*, at p. 622.) Even assuming there was no forfeiture (§ 1259), we conclude the contention fails on the merits.

In reviewing a challenge to a jury instruction, the appellate court must consider the instructions as a whole and assume that jurors are capable of understanding and correlating all of the instructions given to them. (*People v. Fitzpatrick* (1992) 2 Cal.App.4th 1285, 1294.) The standard of review in an appellate challenge to the accuracy or adequacy of an instruction is whether there is a reasonable likelihood that the jury applied the instruction in a way that denied fundamental fairness. (*Estelle v. McGuire* (1991) 502 U.S. 62, 72–73 [we evaluate the whole record, including instructions in their entirety and arguments of counsel].)

"There are two distinct forms of culpability for aiders and abettors." (*People v. Chiu* (2014) 59 Cal.4th 155, 158 (*Chiu*).) First, a defendant is an aider and abettor if he or she, "acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages or instigates, the commission of the crime." (*People v. Beeman* (1984) 35 Cal.3d 547, 561 (*Beeman*).) Second, an aider and abettor " 'is guilty not only of the offense he [or she] intended to facilitate or encourage, but also of any reasonably foreseeable offense committed by the person he [or she] aids and abets. . . .' " (*People v. Prettyman* (1996) 14 Cal.4th 248, 261 [known as the natural and probable consequences doctrine].) Thus, a defendant may be criminally responsible as a direct aider and abettor for the crime he or she intended to abet, and can also be responsible as an indirect aider and abettor for any other crime that is the " 'natural and probable consequence' of the target crime." (*Ibid*.)

Here, the prosecutor argued that defendant Montano was a perpetrator of the rape and a direct or indirect aider and abettor of the rape by a foreign object and oral copulation. He argued that defendant Peter was a perpetrator of the rape by a foreign

object because he digitally penetrated Jane, or was a direct or indirect aider and abettor of all three offenses.

As defendants concede, the language of CALJIC No. 3.01, which describes direct aider and abettor liability, came directly from *Beeman, supra,* 35 Cal.3d 547. There, the Supreme Court held that a prior version of CALJIC No. 3.01, as worded at the time, did not adequately instruct the jury regarding the aider and abettor's requisite intent. (*Id.* at p. 561.) The former version of CALJIC No. 3.01, as given in *Beeman*, provided: " 'A person aids and abets the commission of a crime if, with knowledge of the unlawful purpose of the perpetrator of the crime, he aids, promotes, encourages or instigates by act or advice the commission of such crime.' " (*Id.* at p. 555.)

The Supreme Court stated: "There is no question that an aider and abettor must have criminal intent in order to be convicted of a criminal offense." (*Beeman, supra,* 35 Cal.3d at p. 556.) In the case of direct aider and abettor liability, "the aider and abettor must share the specific intent of the perpetrator. By 'share' we mean neither that the aider and abettor must be prepared to commit the offense by his or her own act should the perpetrator fail to do so, nor that the aider and abettor must seek to share the fruits of the crime. [Citation.] Rather, an aider and abettor will 'share' the perpetrator's specific intent when he or she knows the full extent of the perpetrator's criminal purpose *and* gives aid or encouragement with the intent or purpose of facilitating the perpetrator's commission of the crime." (*Id.* at p. 560.) The court therefore held that a direct aider and abettor is a person who, "acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages or instigates, the commission of the crime." (*Id.* at p. 561.) As given in defendants' case, CALJIC No. 3.01 explicitly set forth this "share[d]" or "specific intent" that defendants were required to have by informing the juries that both knowledge *and* intent were required for defendants to be guilty on a direct aider and abettor theory.

Defendants assert that because the Supreme Court later clarified in *People v. Mendoza* (1998) 18 Cal.4th 1114 (*Mendoza*) that aiding and abetting liability is an

offense that requires "specific intent," CALJIC No. 3.01, which refers only to "intent," is inadequate. We disagree.

The Supreme Court in *Mendoza, supra,* 18 Cal.4th 1114, addressed what it characterized as the "narrow question" of whether defendants who are tried as aiders and abettors are entitled to present evidence of intoxication to show they lacked the requisite mental states of knowledge and intent. (*Id.* at p. 1126.) The court answered in the affirmative, concluding the intent requirement for an aider and abettor fits within the definition of "required specific intent" as set forth in section 29.4, subdivision (b) (former section 22, subdivision (b)), which provides that evidence of voluntary intoxication "is admissible solely on the issue of whether or not the defendant actually formed a *required specific intent* . . . ." (Italics added.)[7]

The Supreme Court in *Mendoza* did not hold that CALJIC No. 3.01 misstates the law or that it is inadequate in instructing a jury of the requisite mental state. Rather, the court essentially approved *Beeman* and CALJIC No. 3.01, stating: "The actual perpetrator must have whatever mental state is required for each crime charged, here shooting at an inhabited building, murder, and attempted murder. An aider and abettor, on the other hand, must 'act with knowledge of the criminal purpose of the perpetrator *and* with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense.' (*People v. Beeman* (1984) 35 Cal.3d 547, 560 . . . .)" (*Mendoza, supra,* 18 Cal.4th at p. 1126.) The opinion also did not suggest that the term "specific intent" should be used in the instruction. In fact, the court cautioned that the division of crimes into the categories of "general intent" and "specific intent" is "simplistic," "potentially confusing," and prone to "conceptual difficulties." (*Id.* at

[7] We note that defendants' juries were instructed with CALJIC No. 4.21.1 that liability as an aider and abettor requires a specific intent or mental state, and that the juries could consider evidence of voluntary intoxication in determining whether a defendant tried as an aider and abettor had the required mental state. Thus, the juries were properly instructed not only that aider and abettor liability is a specific intent offense but also that they could consider the effect that voluntary intoxication had on defendants' mental states.

pp. 1126, 1127.)

Of significance here is that since its decision in *Mendoza*, the Supreme Court has described the requisite mental state for aiders and abettors in ways that track the language of CALJIC No. 3.01. (E.g., *People v. McCoy* (2001) 25 Cal.4th 1111, 1118 (*McCoy*); *People v. Lee* (2003) 31 Cal.4th 613, 624.) CALJIC No. 3.01 as given in this case fully comported with the intent element requirements set forth in *Beeman* and subsequent cases. The trial court did not err in giving the instruction.[8]

2. CALJIC No. 3.00

The trial court instructed the juries with CALJIC No. 3.00 as follows: "Persons who are involved in committing or attempting to commit a crime are referred to as principals in that crime. Each principal, regardless of the extent or manner of participation is *equally guilty*. Principals include: [¶] 1. Those who directly and actively commit or attempt to commit the act constituting the crime, or [¶] 2. Those who aid and abet the commission or attempted commission of the crime."

Defendant Montano contends—and defendant Peter joins in the contention—that the "equally guilty" language in the instruction was misleading because it suggested to the juries that they were not allowed to find defendants less culpable than the perpetrators of oral copulation or rape/rape with a foreign object. Defendants did not object to or request modification of this instruction and, therefore, forfeited this claim. (*People v.*

[8] Defendant Montano also asserts the prosecutor "took full advantage of the deficiencies" in the instructions by arguing the law incorrectly. He complains, for example, that the prosecutor argued: "[Mr. Montano] jumped in with them knowing what was going on. There's no other way to interpret what was going on there. And then he intentionally helped out. That's aiding and abetting for the crimes that he didn't personally commit." Defendant Montano should have objected to these arguments below. (*People v. Gamache* (2010) 48 Cal.4th 347, 371 [forfeiture of prosecutorial misconduct claim where defendant did not object and request admonition at the time of the misconduct].) In any event, we conclude the prosecutor's closing arguments, read as a whole, adequately informed the jury that defendants must have acted with both knowledge and intent to be criminally liable as aiders and abettors.

Guiuan (1998) 18 Cal.4th 558, 570.)[9] Even assuming there was no forfeiture (§ 1259), we conclude the contention fails on the merits.

CALJIC No. 3.00 is a basic introductory instruction that provides that a perpetrator and an aider and abettor are both principals. The Supreme Court has stated that it sets forth a "correct rule of law" that "[a]ll principals, including aiders and abettors, are 'equally guilty' in the sense that they are all criminally liable. (See § 31.)" (*People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 433.)

Defendants rely on a series of cases in which courts found the "equally guilty" language problematic in the context of homicide. In *McCoy, supra*, 25 Cal.4th at page 1119, for example, the Supreme Court held the term "equally guilty" was misleading because the aider and abettor of a homicide could be guilty of a higher degree of homicide than the perpetrator if the perpetrator killed unpremeditatedly, drunkenly, or in provocation, while the aider and abettor assisted premeditatedly, soberly, and calmly. Later cases extended the reasoning in *McCoy* to hold that a jury can also find an aider and abettor of a homicide guilty of a *lesser* crime than the perpetrator based on a less culpable mental state. (E.g., *People v. Samaniego* (2009) 172 Cal.App.4th 1148; *People v. Nero* (2010) 181 Cal.App.4th 504, 513–514.) All of the cases, however, discuss the "equally guilty" language only in the context of homicide—a crime with different levels of culpability requiring different mental states—and the Supreme Court in *McCoy* expressly limited its holding to homicide cases. (*McCoy, supra*, 25 Cal.4th at p. 1122, fn. 3 ["we express no view on whether or how these principles apply outside the homicide context"].) Defendants cite no authority that supports their position that the analysis should apply in a nonhomicide context.

Here, the trial court also instructed the juries with CALJIC No. 3.01, which

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[9] It appears that the version of CALJIC No. 3.00 that was in effect at the time of the trial gave the trial court the option of instructing that each principal was either "equally guilty" or simply "guilty of a crime." (CALJIC No. 3.00 (spring and fall 2012 eds.).) Defendants did not request the use of the term "guilty of a crime" in lieu of "equally guilty."

informed the juries that they were to base their decisions regarding defendants' criminal liability on each defendant's state of mind, including his knowledge of the perpetrator's purpose and his intent to facilitate the crime, not simply on the perpetrator's mental state. (See *People v. Mejia* (2012) 211 Cal.App.4th 586, 625 [CALJIC No. 3.01 clarified any ambiguity created by CALJIC No. 3.00's reference to principals being "equally guilty" to aiders and abettors].)

The juries were also instructed with CALJIC No. 3.02—the natural and probable consequences doctrine—which further explained that an aider and abettor's liability is not necessarily equivalent to the perpetrator's liability.[10] This instruction informed the juries that they could not automatically find defendants guilty of crimes the direct perpetrator(s) committed. Rather, if they were to find defendants guilty under the natural and probable consequences doctrine, they had to find the requisite mental state necessary for direct aider and abettor liability for a target offense or offenses *and* that the other crimes were natural and probable consequences of the target offense(s). The juries had sufficient information from which to understand that the phrase "equally guilty," when viewed in context, meant "also guilty."

Defendants argue the prosecutor's closing argument misled the juries as to the meaning of the term "equally guilty." We disagree. The prosecutor told defendant Montano's jury that principals "who directly and actively commit crimes" and those who aid and abet the crimes are "both guilty. And, in fact, under the law, as far as your purposes as the jury, the guilt is equal. Whether they're the direct actor or the aider and

[10] This instruction provides that to find the defendants guilty of the in concert sex crimes under the natural and probable consequences doctrine, "you must be satisfied beyond a reasonable doubt that: [¶] 1. The crimes of forcible rape, forcible act of sexual penetration, forcible oral copulation, [and other listed target offenses] . . . were committed; [¶] 2. That the defendant aided and abetted those crimes; [¶] 3. That a co-principal in that crime committed [one or more of the in concert sex crimes]; and [¶] 4. The [in concert sex crimes] were a natural and probable consequence of the commission of the crimes of forcible rape, forcible act of sexual penetration, forcible oral copulation, [and other listed target offenses]. . . ."

abettor, the guilt is equal. [¶] And not only that, if some person is a better aider and abettor than the other doesn't make any difference. You know, sometimes jurors are tempted to say, 'You know, Mr. Montano is definitely guilty, but compared to Mr. Ortega, he's not as guilty.' [¶] Well, that's not the way the law is. The law says no matter how big of a part you played, if you played a part, you're guilty."

Similarly, the prosecutor argued in closing to defendant Peter's jury: "Principals to a crime are made up of two different types of people[:] those who directly and actively commit the crime and those who aid and abet the crime. . . . [¶] And you know what's interesting about it? We've decided when we made our laws that the guilt is equal. The person who helps the robber is as guilty as the robber, as far as for the purposes of the jury's decision. . . . [¶] . . . [¶] And be careful as jurors that you don't go, 'Well, you know, compared to Mr. Montano, Mr. Peter is not as guilty.' Well, may be. Except for that's like saying you're only a little pregnant. You're guilty. Once you're guilty, you're guilty. Even if, even if the participation of [*sic*] the crime was less than another person's participation in a crime, if you're an aider and abettor, as far as your verdict forms go, you're equally guilty."

The above statements, together, show the prosecutor was cautioning the juries against finding defendants not guilty simply because defendants' acts were not as egregious as the acts of the direct perpetrators. The prosecutor correctly explained that "equally guilty" means the perpetrator and the aider and abettor are "both guilty." He used the terms "equally guilty" and "both guilty" interchangeably to defendant Montano's jury, and did not suggest to either jury that defendants and Ortega were necessarily guilty of the same crime. Rather, he merely stated defendants were criminally responsible even if they were not "as guilty" as Ortega.

Viewing the record as a whole, including reading CALJIC No. 3.00 in conjunction with other instructions and the arguments of counsel, we conclude there was no reasonable likelihood the instruction misled the juries in a way that denied fundamental fairness. (*Estelle v. McGuire*, *supra*, 502 U.S. at pp. 72–73.)

3. Natural and Probable Consequences Doctrine

As noted, the trial court instructed the jury with CALJIC No. 3.02 regarding the natural and probable consequences doctrine. In doing so, the court instructed the juries that defendants were liable for rape or penetration with a foreign object in concert (§ 264.1, subd. (a)) or oral copulation in concert (former § 288a, subd. (d)) if the crimes were the natural and probable consequences of other crimes that defendants encouraged with the requisite intent. Defendants contend this was error because in their view, criminal defendants should not—either as a matter of law or for public policy reasons—be found guilty of these crimes under an indirect theory of liability such as the natural and probable consequences doctrine. Defendants did not raise this issue below and have therefore forfeited the claim. The contention also fails on the merits.

Section 264.1, subdivision (a) and former section 288a, subdivision (d) are worded similarly, making it punishable for a person who, "voluntarily acting in concert with another person," commits an act of rape, penetration by a foreign object, or oral copulation, "*either personally or by aiding and abetting the other person . . . .*" (§ 264.1, subd. (a); former § 288a, subd. (d), italics added.) Defendants argue that this italicized language in the statutes shows that criminal defendants are liable for these offenses only if they were directly involved in the offenses, and not if the offenses were merely natural and probable consequences of other criminal acts.

The plain language of the statutes, however, provides that defendants can be liable for these offenses "by aiding and abetting," i.e., through aider and abettor liability. The notion that an aider and abettor may be held liable not only for the crime he or she encourages or facilitates *but also for any other offense that was a natural and probable consequence of the crime* is not a new concept, but one that dates back to common law. (*People v. Prettyman, supra,* 14 Cal.4th at p. 260 [defendant can be liable as a direct aider and abettor or indirectly under the natural and probable consequences doctrine]; *Chiu, supra,* 59 Cal.4th at p. 158 [same].) We therefore presume that the Legislature was aware of this when it enacted section 264.1 and former section 288a and that it would have explicitly limited application of the statutes to direct aider and abettor liability had it

intended to exclude indirect aider and abettor liability based on the natural and probable consequences doctrine. Accordingly, absent an express statement to the contrary, the statutory reference to aider and abettor liability includes both forms of aiding and abetting liability. We reject defendants' contention that the statutes should be read to include one form of aider and abettor liability and exclude the other.

Case law supports our conclusion. In *People v. Pelayo* (1999) 69 Cal.App.4th 115, 121, for example, the court upheld a conviction of penetration by a foreign object in concert based on the doctrine where one defendant aided and abetted the other's digital penetration of the victim by locking the door and preventing the victim from escaping. Similarly, in *People v. Nguyen* (1993) 21 Cal.App.4th 518, 533–534, the court upheld convictions of penetration by a foreign object in concert after concluding the crime was a natural and probable consequence of an invasion-style robbery of a tanning salon.

Defendants also argue the natural and probable consequences doctrine should not apply to these crimes as a matter of public policy. We disagree. Section 264.1 and related statutes were enacted with "[t]he obvious purpose . . . to provide increased punishment where there is a gang sexual assault and to insure that those who participate in such assaults, either by personally engaging in the ultimate sexual act or by voluntarily helping others to accomplish it, receive the enhanced punishment." (*People v. Calimee* (1975) 49 Cal.App.3d 337, 341.) "The ' "acting in concert language" [covers] *both* the person who committed the physical act *and* the person who aided and abetted.' [Citation.] The purpose of proscribing 'in concert' conduct is to protect against gang sexual assault. [Citation.] 'It also exhibits a legislative recognition that [sexual assault] is even more reprehensible when committed by two or more persons.' " (*People v. Adams* (1993) 19 Cal.App.4th 412, 429, second italics added.) These considerations are no less applicable to a defendant who commits an offense the natural and probable consequences of which are the commission of in concert sexual crimes.[11]

[11] As defendants point out, the Supreme Court in *Chiu, supra,* 59 Cal.4th at page 166, carved out a public policy exception when it held that a defendant who aids and abets a crime that results in a murder may be held liable for second degree murder—

4. Special Instructions

The trial court instructed the jury with several special instructions the prosecutor requested. Defendant Montano contends—and defendant Peter joins in the contention—that the court erred in instructing the jury that: "Aiding and abetting may be committed on the spur of the moment, that is, as instantaneous as the criminal act itself. Aiding and abetting can occur prior to a criminal act or during its commission." (Italics omitted.) Defendants' only objection to this special instruction was to a second paragraph, which the court declined to give. They therefore forfeited this claim. Their contention also fails on the merits.

As defendants acknowledge, the "spur of the moment" language in this instruction came directly from *People v. Swanson-Birabent* (2003) 114 Cal.App.4th 733, 742, in which the court held the evidence was sufficient to support a lewd and lascivious act conviction against the defendant where she stood by and watched while her boyfriend molested her daughter. (*Id*. at pp. 741–743.) The defendant argued that in order for her to be liable as an aider and abettor, she must have had advance knowledge that her

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but not first degree murder—under the natural and probable consequences doctrine. The court explained that the purpose of the doctrine in the context of murder is to deter people from aiding the commission of offenses that would naturally and probably result in murder. (*Id*. at p. 165.) "[W]hether a direct perpetrator commits a nontarget offense of murder with or without premeditation and deliberation has no effect on the resultant harm" because "[t]he victim has been killed regardless . . . ." (*Id.* at p. 166.) Thus, "the connection between the defendant's culpability and the perpetrator's premeditative state is too attenuated to impose aider and abettor liability for first degree murder under the natural and probable consequences doctrine . . . ." (*Ibid*.)

These principles do not apply to sex crimes committed in concert. Unlike premeditation, in concert sex crimes do not require a different mental state than sex crimes committed individually. The difference, rather, lies in the defendant's conduct, i.e., whether he or she was voluntarily acting in concert with one or more other persons. In addition, a sex crime committed in concert does have an effect on the harm the victim suffers, e.g., it may make escape more difficult or increase the likelihood of additional crimes being committed against the victim. We decline to expand the exception the Supreme Court in *Chiu* created for first degree murder, to in concert sex crimes. (See *People v. Flores* (2016) 2 Cal.App.5th 855, 869 [concluding the analysis in *Chiu* "is limited to . . . first degree murder"].)

boyfriend planned to molest her daughter. (*Id.* at p. 742.) The court rejected this argument, holding: "advance knowledge is *not* a prerequisite for liability as an aider and abettor. 'Aiding and abetting may be committed "on the spur of the moment," that is, as instantaneously as the criminal act itself.' " (*Ibid*.)

Defendants do not deny that advance knowledge of the direct perpetrator's purpose is unnecessary, but claim the special instruction improperly steered the juries away from having to find defendants acted with the intent to aid or encourage the direct perpetrator's crime. The instruction, however, properly clarified a point not addressed by the standard instruction, CALJIC No. 3.01, of when the aider and abettor's knowledge and intent must arise. It instructed the juries that defendants could be guilty of aiding and abetting Ortega, Morales, and others who committed sexual offenses against Jane even if they did not know the offenses were occurring until they arrived at the courtyard and saw the crimes in progress.

Moreover, the juries were also instructed with CALJIC No. 3.31.5, which explained that aiding and abetting liability requires a union or joint operation of act and the required mental state, and that "[u]nless this mental state exists aiding an [*sic*] abetting is not established." The juries were capable of correlating these various instructions and understanding that although an aider and abettor could decide on the spot to help the perpetrator, the requisite intent and the joint operation of act and intent nevertheless had to be present. (*People v. Fitzpatrick*, *supra*, 2 Cal.App.4th at p. 1294 [we consider the instructions as a whole and assume that jurors are capable of understanding and correlating all of the instructions given to them].)

Defendants contend the special instruction was deficient for the additional reason that it failed to define the word "during" and therefore did not instruct the juries how to determine when the sex crimes were over. They argue: "A sex offense is complete once the offending act ends, and aid rendered thereafter is as an accessory." "No instruction suggested or implied how the jury is to resolve the 'bright line' question between aid *during* the crime and aid *after* the crime." They claim the effect of this was to allow the juries "to assign guilt [to either defendant] as an aider and abettor for an accessory

violation of section 32 [aiding a principal after a felony has been committed with the intent to assist the principal in avoiding or escaping arrest] . . . ." There was no evidence in this case, however, that defendants assisted Ortega, Morales, or each other as accessories *after* the sex offenses were over, say, by helping them escape or by destroying evidence. Thus, there is no way the juries in this case would have been misled by the instruction to find defendants guilty as accessories under section 32.

We note that CALCRIM No. 401 uses the same language contained in the special instruction. It provides in part: "To prove that the defendant is guilty of a crime based on aiding and abetting that crime, the People must prove that: [¶] 1. The perpetrator committed the crime; [¶] 2. The defendant knew that the perpetrator intended to commit the crime; [¶] 3. Before or during the commission of the crime, the defendant intended to aid and abet the perpetrator in committing the crime; AND [¶] 4. The defendant's words or conduct did in fact aid and abet the perpetrator's commission of the crime." (CALCRIM No. 401 (2018) p. 157.) CALCRIM No. 401 has been approved as a correct statement of the law. (*People v. Stallworth* (2008) 164 Cal.App.4th 1079, 1103.) In fact, one appellate court found error because the jury was instructed with CALJIC No. 3.01, which does not contain this "key language": "Before or during." (*People v. Sedillo* (2015) 235 Cal.App.4th 1037, 1067.) We conclude the trial court did not err in giving the special instruction.

Finally, defendants contend they were denied effective assistance of counsel to the extent any of their instructional claims were forfeited. As discussed above, all of defendants' contentions, even aside from any forfeitures, are also meritless. Thus, even assuming counsel's performance was deficient, we would conclude there is no reasonable probability the result of the proceedings would have been any different but for the deficient performance. (*Strickland v. Washington* (1984) 466 U.S. 668, 693–694 (*Strickland*); *People v. Ledesma* (1987) 43 Cal.3d 171, 217–218.)

B. Defendant Montano – Juror Information

Defendant Montano contends the trial court erred in denying his motion to release confidential juror information. We reject his contention.

1. Factual Background

Several weeks after the jury returned its verdict, defendant Montano filed a motion to release juror information. Defense counsel declared that juror number 7 (JN7) told her after trial that she felt pressured to " 'vote[] for conviction' . . . in large part because she didn't 'want to be the one to hang the jury' and . . . was afraid of being 'hounded by the media' if she had been the lone 'hold-out.' " Defendant Montano's mother (Mrs. Montano) also submitted a declaration stating that during the trial, she heard JN7 speaking to the foreperson outside the jury room during a break. She did not hear what JN7 said, but the foreperson responded, "If you want to find him guilty of a lesser charge. . ." The foreperson stopped talking upon seeing Mrs. Montano.

Defendant Montano also filed a motion to continue the sentencing hearing on the basis that defense counsel had received information about another possible suspect and needed time to look into the matter. Counsel declared that someone told Mrs. Montano's cousin about 10 days after the verdict that his daughter's estranged husband said he had assaulted Jane with a skateboard on the night of " 'the Richmond Gang Rape Case.' " The estranged husband, like defendant Montano, was "skinny," "Hispanic," and had "long hair worn in a ponytail."

At the trial court's request, and without objection, Mrs. Montano testified at the hearing on the motions. She testified that during the lunch break on the day the jury was in deliberations, she and her husband were waiting outside the courtroom when JN7 and the foreperson walked by, about 11 feet away. In response to something JN7 said that Mrs. Montano did not hear, the foreperson said, "No, that's if you want to find him guilty of a lesser charge." The remark was made in a normal tone of voice, and neither seemed angry or frustrated. Mrs. Montano's husband, who is hard of hearing, did not hear the comment. Mrs. Montano thought nothing of the remark at the time but mentioned it to defense counsel after the verdict, when they were discussing motions. Mrs. Montano denied that she would lie to help her son or that she felt guilty for convincing him not to accept a plea deal. Mrs. Montano wrote on a floor plan where exactly she was sitting and where the jurors walked as they spoke.

The trial court denied the motions. As to the continuance, the court noted there were at least a dozen other men there that night, and that the fact that someone other than defendant Montano may have "also raped this young woman with a skateboard . . . does not alleviate or diminish Mr. Montano's responsibility for which he was convicted." As to the request for juror information, the court stated that the evidence regarding JN7 feeling pressured to convict was "not allowed by the code" because it is improper to "go into the thought process of the jury." The court found as to Mrs. Montano that her testimony was unreliable and that it was suspect that she did not inform counsel of the comment she overheard for weeks after the jury had reached its verdict. The court stated Mrs. Montano must be feeling guilty for convincing her son not to plead guilty and that she appeared "desperate" to help him. The court questioned Mrs. Montano's credibility, stating she "could not even look at me when I asked her questions. She turned around and she dropped her eyes down." The court stated that the physical layout of the courthouse including the exit the jurors used also diminished the credibility of her claim. The court found the statement was, in any event, "innocuous" and did not constitute misconduct. Noting that the defense is required to show some prejudice, the court found the defense had failed to meet that burden.

2. Discussion

Once the jury's verdict is recorded, the trial court's record of personal identifying information of individual jurors must be sealed until ordered otherwise. (Code Civ. Proc., § 237, subd. (a).) The defense may "petition the court for access to personal juror identifying information within the court's records necessary for the defendant to communicate with jurors for the purpose of developing a motion for new trial or any other lawful purpose." (Code Civ. Proc., § 206, subd. (g).) The petition must be "supported by a declaration that includes facts sufficient to establish good cause for the release of the juror's personal identifying information." (Code Civ. Proc., § 237, subd. (b).) "The court shall set the matter for hearing if the petition and supporting declaration establish a prima facie showing of good cause for the release of the personal juror identifying information . . . ." (Code Civ. Proc., § 237, subd. (b).)

Here, the trial court properly declined to consider evidence relating to the pressure JN7 felt to convict. Evidence Code section 1150, subdivision (a) provides that upon an inquiry as to the validity of a verdict, the court may consider statements, conduct, conditions, or events occurring inside or outside the jury room "of such a character as is likely to have influenced the verdict improperly." However, "[n]o evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined. (*Ibid.*) " '[A] verdict may not be impeached by inquiry into the juror's mental or subjective reasoning processes, and evidence of what the juror "felt" or how he understood the trial court's instructions is not competent.' " (*People v. Morris* (1991) 53 Cal.3d 152, 231, disapproved on other grounds in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1.) Evidence regarding the pressure JN7 felt, which had the "effect of" "influencing [her] to assent or dissent from the verdict," was properly excluded under Evidence Code section 1150.[12]

The trial court also properly found that defendant Montano did not meet his burden of showing good cause as to the conversation that his mother said she overheard. As noted, the court found Mrs. Montano's version of the facts to be unreliable for various reasons, including her delay in informing defense counsel of this issue, the physical layout of the courthouse, and her demeanor at the hearing. Defendant Montano

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[12] Defendant Montano also argues that JN7's description of "yelling" or "bullying" that occurred in the jury room was admissible because it was "conduct" or an "event" "of such a character as is likely to have influenced the verdict improperly." (Citing Evid. Code, § 1150.) " 'The reason for a rule barring a juror from testifying concerning his own mental processes—frankness and freedom of discussion in the jury room, [citation]—applies with equal force to testimony by other jurors concerning *objective manifestations of those processes*.' " (*People v. Elkins* (1981) 123 Cal.App.3d 632, 637, italics added [trial court properly excluded juror affidavits "whose effect [was] to prove the subjective reasoning processes of a juror"].) Because evidence regarding "yelling" and "bullying" constituted "objective manifestations" of the jurors' mental processes, and was being offered to prove JN7's subjective reasoning process, the court properly excluded it under Evidence Code section 1150.

complains that the court improperly passed judgment on Mrs. Montano's credibility at the "prima facie" stage of the proceedings. Defendant Montano forfeited any procedural irregularity by failing to object to the court's request to produce Mrs. Montano for testimony. Once presented with live testimony, the court was free to form an opinion as to her credibility.

In any event, we would conclude there was no error because the foreperson's comment did not rise to the level of misconduct. Mrs. Montano overheard what appeared to be a friendly discussion about the law between two jurors just as they were leaving the jury room. While the jurors did not strictly adhere to the trial court's instruction of CALJIC No. 17.52 not to converse among themselves during a period of recess, the conversation was brief and occurred in the hallway just a few steps from the jury room, as the jurors were leaving to go to lunch. The comment constituted, at most, a technical violation of the admonition and did not support a finding of misconduct "of such a character as is likely to have influenced the verdict improperly" (Evid. Code, § 1150, subd. (a); *People v. Jefflo* (1998) 63 Cal.App.4th 1314, 1322). The court properly determined there was no good cause to disclose juror information to allow defense counsel to investigate a claim of juror misconduct.

C. Defendant Peter – Voluntariness of Confession

Defendant Peter contends the trial court erred in admitting evidence of his confession to police. He asserts his confession was involuntary because it was obtained as a result of an implied promise of leniency. We reject his contention.

1. Factual Background

a. October 28, 2009 Statement

Police first interviewed defendant Peter on October 28, 2009. After being advised of his *Miranda* rights (*Miranda v. Arizona* (1966) 384 U.S. 436), defendant Peter said he knew he was going to be questioned about the Richmond High School rape and admitted he was at the school that night. Someone said there was a drunk girl having sex with everybody, so he went to see what was going on. He was expecting to see "some drunk girl" "doing this stuff on her own," but instead, he saw a "motionless body" and thought

she was dead. He also saw Ortega punch and kick the girl in the face and head for not orally copulating him. Ortega then dragged the girl to a dark place and stepped on her face. Defendant Peter thought Ortega was going to kill her, and decided to leave the scene and went home.

Johanson told defendant Peter that she did not think he raped the victim but that she believed he "may have gotten in on a little bit of action." When defendant Peter denied this, Johanson said, "[Y]ou might be a little bit concerned that because of everything . . . you've seen on tv," "we're gonna try to pin this shit on you. But we're not." Defendant Peter continued to deny he had done anything wrong. He also denied meeting with J.B. after that night and continued to deny this after the officers said they did not believe him.

Johanson told defendant Peter that Morales had admitted urinating on the victim and taking her ring, which were "not the crime[s] of the century" and "way down here" in the scope of things. She asked defendant Peter whether he told J.B. or Morales that he had "finger banged her." He replied, "Fuck no." He insisted he had not met up with J.B.

Johanson said, "Some of the other guys who fondled her and touched her, not gonna be that big of a deal, in the scope of everything." She added that people said defendant Peter was "bragging about touching her." Defendant Peter responded he would "be more proud of taking down a rival then [*sic*] me go and fondle some, some drunk ass 15 year olds [*sic*] private areas. I would not be proud of that. . . . Who wants to brag on that?" When asked if he would be willing to take a polygraph test, defendant Peter responded, "Nope."

At that point, the other officer who was interviewing defendant Peter with Johanson switched gears and asked who "Schizo and Twofer" were. When defendant Peter said they were just "[s]ome guys," the other officer became angry, and there was a heated exchange between the two. Ultimately, the other officer left the room, saying, "You ain't gonna fuck with me anymore." "We can . . . get you for fuckin' rape." Johanson told defendant Peter that the police had school surveillance videos. Defendant Peter told her he knew from watching the news that the surveillance videos "didn't

work."

Johanson said that not everything on the news was true, and that she had "watched the video." She said, "I don't wanna see you get charged with you sticking your dick in her vagina. Okay?" "However, if there was some action going on there. If you fondled her or you just touched her in a certain way—in the scope of everything that's going on, you have very little to worry about. There's some other guys here today that have a lot to worry about. But in the scope of everything, you have very little to worry about."

Johnson also said, "And you not wanting to take a polygraph, generally is construed as, you know that you'll fail." Defendant Peter responded, "If that's what you want to believe." "Just like you guys told me, I have the right to remain silent. I have the right to have an attorney present[.]" "I could've just said, 'I don't wanna talk.' "

Johanson told defendant Peter to think about what the evidence would show, and said a jury would have respect for him if he said, " 'You know what? I'm not proud of what I did. But you know, she was there. I gave it a little touch.' " Johanson then left defendant Peter for about 10 minutes and returned with a bottle of water. She gave the bottle to defendant Peter and went back into the monitor room. When drinking, defendant Peter did not touch his lips to the bottle, and he wiped down the rim of the bottle after drinking.

Johanson returned to the room and swabbed defendant Peter for DNA. She explained how DNA testing works and told him this was his chance to provide an explanation if his DNA were to show up in Jane's vaginal swab. Johanson asked, "Did you ever touch her at all?" Defendant Peter replied, "No. Not that I remember," and said he was intoxicated. He added, "I don't want this to like, put me down for rape cuz I didn't rape no one. Fuck that." "I know you guys [*sic*] game. You guys are gonna tell me some lies and—" Johanson said she was not playing games.

Johanson asked, "Do you need something like this, screwin' up the next 20 to 25 years of your life? No. You don't." Defendant Peter asked, "So this is 25 years?" Johanson responded, "I'm not sayin' you're gonna get 25 years." "But you . . . do have to understand the severity of what happened here." Defendant Peter said, "It seems like

you guys just take your own assumption of things and then you guys just bring like more little charges in it. And it's like, whoever was around there's gonna get screwed for the whole shit[.]" Johanson responded that was not true.

Johanson said, "The problem that you're having right now is your concern is that your DNA is gonna be on her. And so then [the] question becomes—Why?" Defendant Peter asked whether people were going to be charged with attempted murder, and Johanson responded they were not. She explained that it is the district attorney who "ultimately decides on what charges are filed against each particular defendant in this case. [¶] . . . [¶] And then obviously it'll all go before a jury and a panel of citizens are gonna decide who's guilty of what based on the evidence." Defendant Peter asked whether "[t]here's actually DNA in her," and Johanson responded she did not remember everything in the file.

Defendant Peter asked, "How many charges is it?" and also asked a few questions about the crime of kidnaping. The conversation continued:

"Detective Johanson: Some, some people may have gotten up in this thing and just in the heat of it all, either tried to show off or too intoxicated, not knowin' what they're doing. And just—And you know what? And just did some stupid shit.

"[Defendant Peter]: Yeah.

"Detective Johanson: And didn't know her at all—Didn't know her from Adam. Probably never even seen—Probably, may have been the first time they ever saw her. Other people went to school with her.

"[Defendant Peter]: That was my first time seein' her. But um—Yeah um. Well, I'm just gonna cut to the chase. Well, yeah I fondled her."

Johanson said she was proud of defendant Peter for being honest and she already knew he had fondled her. Defendant Peter replied, "You don't know." When Johanson said, "Believe what you want," defendant Peter responded, "You guys know what we tell you." "And you guys find what people leave." "But there's always things that you never will know."

Defendant Peter then said he decided to confess because he felt for the victim, and

because he thought about how, "if that was one of my relatives or one of my closest friends, I would want someone to admit it to [*sic*] so I'm gonna." "Yeah, I fuckin' like touched her. But that's before I known this was gonna be to this extent. So my innocence was basically snatched, [as] soon as someone raped her."

Defendant Peter went on to explain that when he first arrived at the scene, he thought the victim "got drunk and she fucked all these people. Wow. This girl is like a party animal or somethin'." He thought he was going to get "some major action tonight." "And then when I started [to] see the kickin' and all that shit, I'm like—Hold on. Hold on. Fuck this. This is not goin' as I thought it was gonna go." "So, I left. . . . As far as me meeting up with [J.B.], I could tell you right now that's bullshit." "That's bullshit cuz I went straight to my house."

Defendant Peter continued, "I don't think that I should get in trouble for this cuz I didn't know this was gonna happen." He thought the victim was "fuckin' everybody . . . . And then from there, like, this dude was tryin' to force her to do shit." He said, "She, when I got there, she was like throwing up. And I was just like—Oh. Well, and then . . . . We just got done . . . [h]aving our fun with her and this and that. And, 'You gotta go ahead.' So it's like—Oh. I just like—. . . . Fondled her or whatever you want to call it. And then um, . . . I just backed off. . . . I was like, I'm not gonna fuck her or nothin'." "And . . . I guess someone was like holdin' her up. But she was throwin' up. And then um . . . . We just 'woo'. And then, from there, then that's when . . . I just like fondled her and after that they were just like, 'All right man.' Whatever. And then they just like pulled their pants up."

Things then got out of control, and people "were like wild dogs." "[I]n the beginning," there was "no demanding," and "[i]t was just like nothin'. It was just a normal day. Everything was fine." "We was just havin' fun for a split second, like with the fondling for a quick second then." But Ortega then tried "to force her to do shit" and "just beat her."

Johanson asked, "Did . . . you stick your fingers in there?" Defendant Peter responded, "I don't really know about that. It was just like more of like a, (motioning

fingers on right hand). You know what I'm saying? Like, I don't know how to explain it. Like, it was more of like, like a touch." He said that when he did that, the victim was not wearing any underwear. He said, "Like we ain't even trippin'. And then . . . I just fondled her and then . . . they laid her down. And then um, that's when I was just like—Oh shit. Like, how drunk is she?" Everyone was only having a good time, and "[r]ight before my eyes, everything goes nasty." He said he initially lied and denied touching the victim because he did not want the officers to think he was involved in "the actual beating . . . ." He said, "Look, I'm gonna be going to jail for a long time because of this. Because of someone's stupid— [¶] . . . [¶] [d]esperate, deep, fuckin' thoughts he had."

b. Second Statement – November 1, 2009

In a brief follow-up interview at juvenile hall on November 1, 2009, defendant Peter identified a photo of defendant Montano and said he saw defendant Montano "rape[]" the victim. "He had sexual intercourse with her. But I only seen for a split second." Defendant Peter reiterated that he did not see J.B. the night of the incident.

c. Motion to Suppress

Defendant Peter moved to suppress his statements to police on the grounds that his *Miranda* rights were violated and that his confession was involuntary.

At the hearing on the motion, Johanson testified she went to defendant Peter's home on the night of October 27, 2009, to execute a search warrant. Defendant Peter was not home, so Johanson told his relatives that he should turn himself in. Just after midnight, defendant Peter arrived at the police station, and Johanson and another officer interviewed him for about two and a half hours. Defendant Peter displayed no signs of intoxication and appeared to understand the questions. He was not handcuffed. The officers advised defendant Peter of his *Miranda* rights before questioning him, and defendant Peter indicated he understood his rights.

Johanson and Sergeant Lori Curran conducted a follow-up interview of defendant Peter at juvenile hall on the afternoon of November 1, 2009. They reminded him of his *Miranda* rights. The parties stipulated to the admission of three police reports containing accounts of prior arrests during which defendant Peter was advised of his *Miranda* rights.

Defendant Peter testified that on October 28, 2009, he called home just to check in and was told the police had searched his home for a cell phone. He voluntarily turned himself in. He was 17 years old at the time and in 11th grade at a continuation high school. He had been previously arrested for violating his probation after testing positive for drugs, as a suspect for discharging a gun, and for resisting arrest. He had been read his *Miranda* rights and was questioned without an adult or attorney for the gun offense and, he believed, for the resisting arrest offense. He had also been to court twice with a court-appointed attorney and understood he did not have to talk to the police and had the right to an attorney.

Defendant Peter testified he did not know the police wanted to talk to him about the rape. He thought they were looking for a cell phone and was confused because he did not own one. He told police that he touched Jane but it was not true. He testified, "I've never touched the victim. . . . I guess you're just going to have to prove that I did it." He told police he touched Jane because "I felt I had no choice." "[B]asically they gave me two options. One was . . . if I say nothing then I get everything they said this case was about. . . . [T]he alternative was if I just say that I touched her, then it's nothing . . . it's very little." "If I said nothing, I'd get charged with rape and forcible oral copulation . . . ." "The other one seemed more attractive."

When the police interviewed defendant Peter a second time, they read him his rights and he agreed to talk to them. Defendant Peter did not ask for a lawyer and did not tell police that what he had said about touching the victim was untrue.

The trial court found that defendant Peter's statement was voluntary. The court stated that defendant Peter was not a naive juvenile led astray by police. Rather, when asked if he knew why they had been looking for him earlier, he acknowledged he had seen on the news that there had been a rape. Later, in response to why he would not agree to a polygraph test, he said he did not have to talk to the police at all—that he had the right to remain silent and the right to an attorney—which showed he understood his rights. At one point he was also coy with Johanson, telling her, "You guys know what we tell you. . . . But there's always things you'll never know."

The trial court observed that defendant Peter's demeanor throughout the interview was relaxed, except for the portion where he got into an argument with one of the officers. Even then, he was not intimidated by the officer and told him he was wrong. As for false promises, the court noted that although Johanson asked whether defendant Peter needed something like this screwing up the next 25 years of his life, she later clarified, "I'm not saying you're going to get 25 years." She also told him the district attorney decides on which charges are filed against each defendant.

2. Discussion

The due process clauses of the federal and state Constitutions bar the prosecution from using a defendant's involuntary confession. (*People v. Carrington* (2009) 47 Cal.4th 145, 169.) The test as to whether a confession was voluntary is whether the defendant's will was overborne. (*Ibid.*) Courts apply a "totality of circumstances" test to determine the voluntariness of a confession. On appeal, the trial court's findings as to the circumstances surrounding the confession are upheld if supported by substantial evidence, but the trial court's finding as to the voluntariness of the confession is subject to independent review. (*Ibid*.)

A confession is inadmissible if " 'a person in authority makes an express or clearly implied promise of leniency or advantage for the accused which is a motivating cause of the decision to confess . . . .' " (*People v. Tully* (2012) 54 Cal.4th 952, 985.) "A confession is 'obtained' by a promise within the proscription of both the federal and state due process guaranties if and only if inducement and statement are linked, as it were, by 'proximate' causation . . . . The requisite causal connection between promise and confession must be more than 'but for': causation-in-fact is insufficient." (*People v. Benson* (1990) 52 Cal.3d 754, 778.) "This rule raises two separate questions: was a promise of leniency either expressly made or implied, and if so, did that promise motivate the subject to speak?" (*People v. Vasila* (1995) 38 Cal.App.4th 865, 873.) Answering these questions requires examination of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation. (*People v. Tully*, *supra*, at p. 986; *People v. McWhorter* (2009) 47 Cal.4th 318, 347.) No single factor is

dispositive. (*People v. Williams* (1997) 16 Cal.4th 635, 661.)

The relevant principles regarding implied promises of leniency or benefits are stated in *People v. Hill* (1967) 66 Cal.2d 536, 549: "The line to be drawn between permissible police conduct and conduct deemed to induce or to tend to induce an involuntary statement does not depend upon the bare language of inducement but rather upon the nature of the benefit to be derived by a defendant if he speaks the truth, as represented by the police. Thus, 'advice or exhortation by a police officer to an accused to "tell the truth" or that "it would be better to tell the truth" unaccompanied by either a threat or a promise, does not render a subsequent confession involuntary.' " Moreover, "[w]hen the benefit pointed out by the police to a suspect is merely that which flows naturally from a truthful and honest course of conduct, we can perceive nothing improper in such police activity." (*Ibid*.) The mere exhortation to tell the truth, for example, or a comment that the accused would "feel better" or would be "helping himself by cooperating" is not in itself sufficient to establish improper inducement. (*People v. Jackson* (1980) 28 Cal.3d 264, 299–300, disapproved on other grounds by *People v. Cromer* (2001) 24 Cal.4th 889, 901, fn. 3; *People v. Ditson* (1962) 57 Cal.2d 415, 433.) Truthful and "commonplace" statements of possible legal consequences that are unaccompanied by threat or promise are also permissible police practices and will not alone render a subsequent statement involuntary and inadmissible. (*People v. Anderson* (1980) 101 Cal.App.3d 563, 579.)

Defendant Peter contends his confession was involuntary because it was obtained as a result of an implied promise of leniency. He asserts, for example, that Johanson made an implied promise of leniency when she asked, "Do you need something like this, screwin' up the next 20 to 25 years of your life?" Johanson, however, explained immediately after asking this question that what she wanted was for defendant Peter "to understand the severity of what happened here." She did not specify how defendant Peter's continued denial of criminal involvement could jeopardize his case, and did not suggest defendant Peter would get 20 to 25 years if he did not confess. (See *People v. Carrington*, *supra*, 47 Cal.4th at pp. 173, 174 [no implied promise of leniency where

officer told defendant she was "looking at special circumstances" and that refusing to talk would work against her].) She simply highlighted the seriousness of the case and encouraged him to tell the truth. Further, any ambiguity about leniency was cleared up by Johanson's statement "I'm not sayin' you're gonna get 25 years."

Johanson's statement that the police were not trying "to pin this shit on you" also contained no promises about whether defendant Peter faced charges, what those charges would be, or what penalties applied. The statement was truthful and showed Johanson was trying to determine what had happened and who was involved. She did not imply that defendant Peter would not be liable if he confessed to committing a crime or that he would be given a lesser sentence than what his conduct merited. When defendant Peter said that everyone at the scene was "gonna get screwed for the whole shit," Johanson told him this was not true. She explained that the district attorney decides what charges, if any, to file against each individual and that a jury decides who is guilty based on all of the evidence.

Johanson's remarks that fondling was "not gonna be that big of a deal, in the scope of everything" and that defendant Peter would have "very little to worry about" also did not constitute an implied promise of leniency for confessing to fondling. Defendant Peter reads these statements as suggesting that fondling is a trivial offense that would not subject him to a lengthy sentence. Read in context, however, Johanson's comments conveyed that those who had fondled the victim had less to worry about in comparison to those who had raped and orally copulated her. This was true because the evidence against the latter was likely to be stronger. In fact, Ortega's sperm was found on Jane's mouth and neck, and defendant Montano's DNA was found on an open condom wrapper. Although Johanson's remarks minimized fondling in comparison to rape and oral copulation, they were too vague to amount to a promise of leniency when no particular benefit was identified. (See *People v. Holloway* (2004) 33 Cal.4th 96, 117 ["suggesting that defendant might benefit in an unspecified manner" was not improper].)

The cases on which defendant Peter primarily relies are distinguishable. In *People v. Johnson* (1969) 70 Cal.2d 469, 474, an investigator at the district attorney's office

advised the defendant that any information he gave would not be admissible in court, and another officer neglected to include the right to remain silent in his advisements and did not ask the defendant if he waived the right to counsel. In *People v. Cahill* (1994) 22 Cal.App.4th 296, 306–307, 314–315, the interrogator gave the defendant a detailed, "materially deceptive" account of the law of homicide and led the defendant to believe he could avoid a certain charge if he admitted to his role in the killing. In *In re Shawn D.* (1993) 20 Cal.App.4th 200, 207, 216, the detective "continually raised this theme [of leniency]" with the minor, who was unsophisticated and suffered from posttraumatic stress disorder, and "[t]he promise of leniency in exchange for a confession permeated the entire interrogation."

In contrast, here, the interviewers advised defendant Peter—who was not an unsophisticated minor—of his rights, did not mislead him into believing his statements would not be used in court, did not discuss the specifics of any laws pertaining to sex crimes, and did not make false assurances regarding avoiding certain charges.

Moreover, even assuming Johanson's statements constituted an implied promise, we conclude the confession was not inadmissible because the record of the interview, as a whole, shows the promise was not the reason defendant Peter decided to confess. When Johanson made the above statements, defendant Peter "did not immediately respond by [confessing], which would have reflected his reliance on such promise." (*People v. Linton* (2013) 56 Cal.4th 1146, 1177 [the record did not support the defendant's claim that his admissions and any promise of leniency were causally linked, where the defendant "did not immediately respond" with an admission when the detective "promised leniency"].) Rather, he continued to deny he had done anything wrong.

It was only after Johanson began talking to defendant Peter about DNA evidence that he decided to confess. Immediately after Johanson explained to him how DNA testing works, took a swab, and told him this was his chance to provide an explanation, she asked, "Did you ever touch her at all?" Defendant Peter, who up until that moment had been vehemently denying touching Jane, said for the first time, "No. *Not that I remember*," and explained he was intoxicated. (Italics added.) He confessed shortly

thereafter, stating he felt bad for the victim. The record supports the conclusion that defendant Peter's confession was motivated by a combination of fear of what the DNA evidence would show and his own guilty conscience, rather than from any implied promise of leniency.

An examination of other circumstances surrounding the confession supports the conclusion that the confession was voluntary. Defendant Peter voluntarily went to the police station, waived his *Miranda* rights, and agreed to talk to police. He was not handcuffed. He was not intoxicated and was lucid throughout the interview. He was also an older juvenile, not an unsophisticated child. He showed no fear of the police, and the trial court noted he seemed relaxed throughout the interview.[13] He had previously been arrested on multiple occasions and had waived his *Miranda* rights and spoken to the police without an adult or attorney present. He had been to court with a court-appointed attorney and, by his own admission, understood he had the right to an attorney and the right to remain silent. Despite this, he did not ask to terminate the interview at any time.

The questioning by police was also not aggressive, hostile, or threatening. There was one flare-up with an officer over the identity of "Schizo and Twofer," but the exchange was very brief and defendant Peter responded by standing up to the officer. The rest of the interview was with only Johanson, who was courteous. Further, even after confessing to fondling the victim, defendant Peter suggested he knew more than he divulged, stating, "You guys know what we tell you." "And you guys find what people leave." "But there's always things that you never will know." This statement, " 'far from reflecting a will overborne by official coercion,' " showed he still had the " 'operative ability to calculate his self-interest in choosing whether to disclose or withhold information.' " (*People v. DePriest* (2007) 42 Cal.4th 1, 36.) Having reviewed all of the circumstances surrounding the confession, we agree with the trial court that the

[13] We have reviewed CD's of parts of the interviews that were played to the jury (People's exhibit 113; defendant Peter's exhibit A) and agree with the court's characterization of defendant Peter's demeanor.

confession was not involuntary and was therefore admissible.

D. Defendant Peter – Polygraph Test

The prosecutor introduced portions of defendant Peter's interview with police, which defendant Peter countered by playing a long segment to show the jury the tactics the police used. Defendant Peter contends his trial counsel rendered constitutionally ineffective assistance by failing to redact the parts of the interview during which he declined to take a polygraph test. We disagree.

After the trial court denied defendant Peter's motion to suppress his statements to police, the prosecutor submitted a redacted version of the statement he intended to introduce at trial. Defendant Peter's trial counsel objected that the redacted version did not reflect the context in which the confession was made. The court ruled the defense could not force the prosecutor to admit additional portions of the statement but could ask to have the entire interview admitted.

At trial, the prosecutor played the prosecution's excerpts, which included the three and a half pages of the transcript leading up to defendant Peter's confession. Defense counsel then played an additional 43-page excerpt of the conversation that occurred before the admission. In that excerpt, the officers accused defendant Peter of lying when he denied J.B.'s version of events. Johanson suggested that fondling the victim was not going to be a big deal. The other officer screamed and stormed out of the room. Johanson said that school surveillance cameras recorded the assault and that she did not want defendant Peter to get charged with rape. There were also two references to a polygraph test. First, defendant Peter responded "Nope" when asked whether he was willing to take a polygraph test. Second, Johanson suggested he was refusing the test because he knew he would fail, and he responded that she can believe what she wishes to believe but that he has the right to remain silent and that, in any event, there was no need for a test because he had already given "you guys what you wanted."

In order to prevail on a claim of ineffective assistance of counsel, a defendant must show that (1) counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and (2) there is a reasonable

probability that, but for counsel's errors, the result of the proceeding would have been different. (*Strickland*, *supra*, 466 U.S. at pp. 688, 693–694; *People v. Ledesma*, *supra*, 43 Cal.3d at pp. 214−218.)

To succeed on the first component of deficient performance, the defendant must overcome a strong presumption that counsel's performance fell within the "wide range of reasonable professional assistance," that counsel's actions and omissions were part of " ' "sound trial strategy," ' " and that all significant decisions were the result of "reasonable professional judgment." (*Strickland*, *supra*, 466 U.S. at pp. 689, 690.) If " ' "the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged[,] . . . unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation," the claim on appeal must be rejected.' " (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266.)

For purposes of the second component, a "reasonable probability" of prejudice is one that is "sufficient to undermine confidence in the outcome." (*Strickland*, *supra*, 466 U.S. at p. 694.) To prove prejudice, the defendant "must show 'that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.' " (*Lockhart v. Fretwell* (1993) 506 U.S. 364, 369.)

Defendant Peter's contention fails because he cannot show that trial counsel's performance was deficient. Evidence Code section 356 provides that when one party puts into evidence one part of a statement, the adverse party may introduce other portions of the same conversation that have some bearing upon, or connection with, the statement so as to avoid the creation of a misleading impression. (*People v. Arias* (1996) 13 Cal.4th 92, 156.) Evidence Code section 351.1, subdivision (a) provides that "any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence in any criminal proceeding . . . ."

Here, trial counsel introduced the additional material from defendant Peter's first interview in order to show the police were manipulative. Although counsel could have omitted material involving the discussion of a polygraph test, reasonable counsel could choose to present the excerpt in one continuous segment to show he has nothing to hide

and is not "cherry picking" select portions like the prosecution did. Counsel could also determine that defendant Peter's refusal to take a polygraph test was not harmful because he adequately explained that he was asserting his right to remain silent. Although different attorneys might weigh the risks differently, counsel's decision that the benefits of presenting the material uncut outweighed any potential prejudice from the brief exchange about the polygraph test was not objectively unreasonable.

In any event, there is no reasonable probability the outcome would have differed had counsel redacted the two references to the polygraph test. Both references were brief, and defendant Peter provided reasonable explanations as to why he was declining to take the test. Moreover, any prejudice from the jury hearing about the polygraph test was dwarfed by his admission that he had fondled Jane. Finally, there was ample evidence aside from defendant Peter's confession that supported his conviction, including the numerous witnesses who saw him at the scene, his DNA on an aluminum can left at the scene, the incriminating statements he made in the presence of J.B., and his DNA on a used condom found at the scene. Under these circumstances, there is no reasonable probability the result would have been different had the jury not heard about defendant Peter's refusal to take a polygraph test.[14]

DISPOSITION

The judgments are affirmed.

[14] Both defendants argue the cumulative effect of any errors in their cases requires reversal. In light of our conclusion that all of the contentions lack merit, we conclude there was also no cumulative error.

_____
Jenkins, J.

WE CONCUR:

_____
Siggins, P. J.

_____
Fujisaki, J.